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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1547

D. DWAYNE SHAUFLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent does not challenge the validity or the significance of the propositions of law argued within the Petition. Instead, the Respondent contends that the point is not properly presented by this case. In essence, the Respondent contends that there is no inconsistency between the appellate opinion and that rendered in the trial court. As Respondent views the record,

> "The court of appeals . . . like the district court, found it unnecessary to consider the accuracy of petitioner's representations concerning his net worth." (Resp. Br., at 5).

The Respondent errs in its reading of the record.

The district court found it *indispensable* to consider whether Petitioner's net worth had been misrepresented, and expressly held that Petitioner would have been acquitted if the government had not shown an overstatement of net worth:

> (Defense Counsel): It's not a crime not to list liabilities, Judge.
>
> The Court: It is when—
>
> (Defense Counsel): Only when it results in understating your net worth.
>
> The Court: That's correct. * * * (App. 13a)

* * *

At another point, the trial judge defined with precision the issue which he considered determinative:

> "(Petitioner) essentially falsified his net worth because he owed seven and a half million that he didn't say he owed. And the issue isn't what his net worth is. The issue is whether he falsified it. * * * (App. 11a)

Respondent is likewise inaccurate in its statement that Petitioner claims in this Court "that the court of appeals recast the allegations of the indictment by treating Antioch's obligations as his personal debts." (Resp. Br., at 5) There was never any question but that Petitioner was liable, as a general partner, for the debts of the Antioch partnership. The court of appeals recast the

theory of guilt, by holding that Petitioner was guilty for a reason antithetical to that relied upon by the trial court.

The argument made within Respondent's second point, and in its footnotes numbered 8 and 9 (Br. 6-7) seems contrary to reason, and is significantly different from the theories on which it relied in either of the courts below. It is hard to imagine that a banker would treat a $7.5 million "net" value of an active business enterprise as a representation that the business owned assets whose raw worth is $7.5 million, while owing not one penny of debt.

If any banker who received such a statement had desired further detail, he had only to ask. In the absence of any such inquiry, however, the conviction cannot be salvaged by resort to so unrealistic a rationale. The prosecution was required to prove unequivocal falsehood, not the possibility of a naive interpretation of literal truth. *United States v. Diogo*, 320 F.2d 898, 907 (2 Cir. 1963); *Cf. Bronston v. United States*, 409 U.S. 352 (1973).

Respectfully submitted,

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